IN THE

SUPREME COURT OF THE UNITED STATES

No. 76-1141

ODIE DUKE GRIGSON

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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CITATIONS

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To the Honorable Warren Earl Berger, Chief Justice of the Supreme Court of the United States and the Associate Justices of the Supreme Court of the United States:

This is a petition by Odie Duke Grigson for a writ of certiorari to review a judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case.

I. OPINIONS DELIVERED IN COURTS BELOW

The District Court for the Eastern District of Kentucky rendered an Opinion herein and it appears at Appendix A. The Court of Appeals for the Sixth Circuit did not render an opinion herein but entered an Order affirming the judgment of the District Court. That Order appears at Appendix B. Neither the Opinion or Order have been reported.

II. JURISDICTIONAL STATEMENT

The date of the Judgment of the Court of Appeals sought to be reviewed is December 13, 1976. An Order of the Court of Appeals denying a timely filed Petition for Rehearing was entered on January 20, 1977 and is appended at Appendix C. This Court's jurisdiction is invoked under Title 28 U.S.C. 1254 (1).

III. THE QUESTIONS PRESENTED

1. Whether a State Officer who issues a valid traffic citation to the operator of a truck, which was in interstate commerce and which at the time was in violation of Kentucky law, in that the truck exceeded the State's weight limitations and who later obtained money from the trucker in exchange for tearing up the valid citation is in violation of Section 18 U.S.C. 1951 — The Hobbs Act, which act provides that whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce by robbery or extortion shall be punished in accordance therewith?

2. Whether in a case, as here where the facts are undisputed, a holding by the Appellate Court that the evidence was sufficient to support the judgment of the District Court is proper and responsive where the only issue presented was one of law, that question being one of jurisdiction?

3. Does every payment by one in commerce to another adversely affect commerce?

4. Must there be an element of coercion present in the act of the accused before there can be extortion within the meaning of the Act?

5. Does the Hobbs Act contemplate that the words "robbery" and "extortion" be used conjunctively and if so, did Congress intend to give broader protection against extortion than it did against robbery?

IV. STATUTE INVOLVED

The statute involved is Title 18 U.S.C. 1951. It is appended hereto as Appendix D. The relevant provisions of the Hobbs Act (18 U.S.C. 1951) are as follows:

> "Section 1951. *Interference with Commerce by Threats of Violence*
>
> (a) Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce by robbery or extortion or attempts or consipres so to do or commits or threatens physical violence to any person or property in furtherance of any plan or purpose to do anything in violation of this section shall be fined not more than $10,000, or imprisoned not more than 20 years, or both.
>
> (b) As used in this section . . .
>
> (1) The term extortion means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear or under color of official right.
>
> • • • • •"

V. STATEMENT OF CASE

The Petitioner, Odie Duke Grigson, an Enforcement Officer for the Kentucky Department of Motor Transportation was indicted and found guilty of two counts of violating the Hobbs Act, Title 18 U.S.C. 1951. The case was tried by the District Judge without a jury. The Defendant

offered no evidence thus admitting that he had committed the acts in the manner described by the Government's evidence. The sole purpose of the Petitioner's plea of not guilty and his Motion for Judgment of Acquittal at the conclusion of the Government's evidence was to test the jurisdiction of the Federal Court to try a matter which the Petitioner considered a violation of law, exclusively within the jurisdiction of the Commonwealth of Kentucky.

The undisputed facts are that at all times set forth in the indictment, Petitioner was an enforcement officer for the Kentucky Department of Motor Transportation, whose primary duty was to enforce the laws of Kentucky pertaining to the operation of trucks on its highways, including the enforcement of weight limitations imposed by Kentucky law on vehicles using Kentucky highways.

(a) Facts Relevant to First Count

On October 15, 1975, one Shinkle was driving a truck for Hughes Construction Company, hauling gravel to Erlanger, Kentucky. It was stipulated that Shinkle was in interstate commerce. He was stopped by the Petitioner Enforcement Officer and was cited to County Court to answer a charge of operating a truck that was overweight by 14,440 pounds. Shinkle admitted that he knew he was overweight and knew that his fine would be in excess of $300.

When Shinkle expressed some consternation over the payment the Petitioner told Shinkle that he could help Shinkle by "working it out" with Shinkle's father-in-law, Hughes, the owner of the truck. Pursuant to a suggestion made by the Petitioner, Hughes met with the Petitioner at a restaurant in Florence, Kentucky, and Hughes paid $50.00 to Petitioner who in turn promised to "take care of it." Thereafter, Shinkle who was the subject of the

citation never appeared in Court or paid any fine in connection with the offense. Hughes testified that the $50.00 paid Petitioner was money from the Hughes Construction Company as would have been the money for a fine had he been required to pay one.

(b) Facts Relevant to Second Count

The facts offered to prove the second of the two counts of the indictment were similar in that on February 20, 1976, one Curtis Mays of Fairfield, Ohio, driving for the Tri-State Drywall Supply Company of Fairfield, was cited by the Petitioner for driving an overweight truck in Campbell County, Kentucky. Again, it was stipulated that the truck was in interstate commerce. At the time Petitioner stopped Mays, he said that the truck was 11,200 pounds overweight on its rear axles and that the fine could be $500-$600. The Petitioner cited Mays to County Court for being overweight and told Mays to have his boss contact the Petitioner and furnished Mays with his home telephone number. Mays subsequently passed this information on to his boss, Don Dwire, who called the Petitioner at the number given. The Petitioner advised Dwire over the telephone that he would "like to help him." Dwire informed the Federal Bureau of Investigation, which sent an agent to pose as Dwire. Petitioner met the agent at the time and place appointed, Southgate, Kentucky, on February 25, 1976.

When the Federal Bureau of Investigation's agent, Harold Harrison, met Petitioner, the Petitioner indicated that he would accept $100 to take care of the citation, but insisted that he receive the citation back. The $100 paid to Petitioner at this time was property of the Federal Bureau of Investigation; but had Dwire met with Pe-

titioner, the money used would have come from the Tri-State Drywall Supply Company.

At the conclusion of the Government's evidence establishing the foregoing facts, the Petitioner moved for a Judgment of Acquittal asserting that the Hobbs Act did not reach the admitted acts of the Petitioner. The primary contentions were (1) that the illegal act of the Petitioner did not affect commerce as required by Title 18, Section 1951, and (2) that the act of the Petitioner did not contain duress or coercion as required by the Act.

The District Court by its Opinion which is appended hereto as Appendix A overruled the Motion, holding as to the first contention, that the effect on commerce in Count One was through the depletion of the assets of the business by the payment of the $50.00 bribe, similar to that in *United States* v. *Crowley,* 504 F. 2d 992 (7th Cir., 1974); and as to Count II, similar to the potential impact upon interstate commerce in *United States* v. *Staszcuk,* 517 F. 2d 53 (7th Cir., 1975). As to the second contention the Court held that whenever a public officer wrongfully accepts money that an extortion has taken place within the meaning of the Act.

Thereupon, judgment was entered by the District Court sentencing Petitioner to imprisonment for two years on each of the two Counts, with the two sentence to be served concurrently.

Petitioner then filed an Appeal to the Court of Appeals for the Sixth Circuit raising the same jurisdictional questions as were presented to the Court of the first instance. Although no factual issue was involved or raised, the Court of Appeals merely entered an Order which is appended hereto as Appendix B, reciting that "the panel was of the opinion that there was substantial evidence to support the judgment of conviction entered by the District Judge and that no prejudicial error occurred at the trial."

VI. REASONS FOR ALLOWANCE OF THE WRIT

1. The question here is a question of law, that is whether or not the undisputed facts established that interstate commerce was interfered with and that such interference was by extortion.

This case presents a very serious question relating to the jurisdictional elements of the Hobbs Act. We think the question of jurisdiction is a question of law and does not turn on the sufficiency of the evidence as was held by the Court of Appeals for the Sixth Circuit. The question here is whether or not the undisputed facts in this case satisfy the jurisdictional requirements of the Act.

As far as we have been able to determine the Court of Appeals for the Sixth Circuit has never undertaken to define the jurisdictional limits of the Hobbs Act. We felt very strongly upon appeal that the Petitioner was entitled to a review of those limitations as applied to the novel facts presented by this case and because of the significant results which will inevitably follow the decision of the court of first instance. The facts are novel because it presents a situation fulfilling a prophecy by Judge Friendly in *United States* v. *Archer,* 486 F. 2d 670 (2nd Cir. 1973) where in considering the related Travel Act, he predicted that if the Act was further extended a person might be convicted for paying ten dollars to a policeman to fix a traffic ticket, if only the person desiring the fix crossed a state line to pay the officer. The results are significant because if the Act of the state officer can be punished without a requisite showing of an interference with interstate commerce, as for taking money to tear up a traffic ticket, then the result is to contribute to the ever

increasing transfer of power from the several States to the National Government.

We feel just as strongly that this Court in its sound judicial discretion should review this matter, as this Court has not elected to fix and define the jurisdictional limitations of the Act since 1960, when it rendered its opinion in the case of *Stirone* v. *United States,* 361 US 212, 4 Led. 2d 252. We think a review of this case is particularly appropriate in light of the fact that since the time of that decision the several Court of Appeals have continuously extended the jurisdiction of the Act to a point where commerce need not be affected and little, if any, connection with interstate commerce is required to establish the jurisdiction of the Act. However, we have found no cases where it has been extended as far as the Court went here and we feel that the result here is in conflict with *Stirone, Ibid.*

This Court in the case of *Stirone* v. *United States,* 361 US 12, 4 Led. 252 (1960), made it very clear that there are jurisdictional limitations to the application of the Hobbs Act. That case pointed out that two essential elements must be shown to constitute a violation. This Court said:

> "Here as the Trial Court charged the jury, *there are two essential elements of a Hobbs Act crime; interference with commerce and extortion.* Both elements have to be charged. *Neither is surplusage and neither can be treated as surplusage.* The charge that interstate commerce is affected is critical since the Federal Government's jurisdiction of the crime rests only on that interference."
> (Emphasis ours)

We think that the facts here fail to establish either element and that the result is in direct conflict with the

Court's opinion. As disreputable as the practice of fixing tickets or citations to a state court may be, a police officer in accepting money to fix a ticket does not commit a Federal offense. This is so because while the citation may interfere and affect commerce, the interference is a privileged interference as it is well within the province of the Commonwealth of Kentucky to act through its police officers to protect its highways from overweight trucks. The after the fact wrong by the officer in accepting a bribe in return for destroying a valid citation could only be of concern to Kentucky. Moreover, since there was no coercion manifest in the color of the policeman's office as it related to the bribe there was an absence of extortion here.

(a) The facts do not establish the first element, i.e, that Petitioner interferred with interstate commerce by obstructing, delaying or affecting it.

Certainly, there was no interference with interstate commerce as a result of the Petitioner accepting money not to turn the valid citation into the Court. The citations made by the Petitioner were lawful and were not wrongful acts under the color of official right because the trucks were admittedly in violation of Kentucky law. The wrong was in the officer taking a small bribe in contravention of his duty to cite the offender to Court where the offender in all probability would be required to pay a fine larger than the bribe. The wrong was not in obstruction, delaying or affecting commerce as denounced by the Hobbs Act, but in fixing the tickets after all aspects of interstate commerce had ceased. It seems to us that instead of impeding the flow of commerce the Petitioner's acts, although reprehensible and clearly in violation of the law of Kentucky,

actually expedited the business of the so-called victim and thus facilitated commerce. The District Court so found.

In response to our suggestion to the Court of Appeals that the facts failed to establish an adverse affect upon interstate commerce the United States by its brief contended "that in a Hobbs Act prosecution the United States does not have to show an adverse affect upon commerce." We are certain that this view directly contravenes the wording of Title 18, Section 1951, and this Court's holding in *Stirone, Ibid.* We are not quite so certain that this view is inconsistent with the Opinions expressed by the Court of Appeals of the several Circuits which during the seventeen years since *Stirone,* have consistently extended or overextended the jurisdiction of the Act.

The United States cites the cases of *United States* v. *Gill,* 490 Fed 2d 233 (7th Cir) *cert. denied* 417 US 968 (1973) and *United States* v. *Staszcuk,* 517 Fed 2d 53 (7th Cir., 1975) *cert. denied* 423 US 27 (1976), in support of this proposition, but we do not believe that either case goes as far as the United States suggests. As we understand *Staszcuk, Ibid,* we believe to the contrary that it confirms the rule that seems to have arisen since *Stirone, Ibid,* that to invoke Federal jurisdiction under the Hobbs Act there must be at least de mininis affect upon interstate commerce. This case reaffirms the proposition that there must be an adverse effect on interstate commerce to bring the Hobbs Act into play. In the face of a strong and well-reasoned dissent the Court merely extends the application of "affect" to those situations where even though the proof shows no actual adverse affect on commerce as all previous cases had required to those situations where there is a "realistic probability" that an extortionistic transaction will have some adverse effect on interstate commerce.

The Court said:

> "There was no need to prove that the extortion was actually intended to obstruct or to affect interstate commerce. The commerce element of the Hobbs Act violation is jurisdictional. Recently the Supreme Court removed such doubt as theretofore existed about the prosecutor's burden of proving 'antifederal scienter.' See United States v. Feola, 420 U.S. 671, 95 S. Ct. 1255, 43 L. Ed. 2d 541 (1975).
>
> "We are also persuaded that the cases which uniformly hold that a threatened effect on interstate commerce is sufficient to bring the statute into play notwithstanding the absence of any actual effect, correctly interprets the congressional purpose. Finally, we have to doubt that the extortion revealed by this record is a species of the 'blackmail upon industry' which Congress mustered its full power to eradicate. The muscle of the faithless public servant is just as intolerable as the muscle of the Camoras described by Judge Hand.
>
> *"This does not mean, however, that we may ignor the constitutional limits on the power of the national government. Nor may we disregard the statutory language which requires the prosecutor to prove some connection with interstate commerce in every case.* We hold, however, that the commerce element of a Hobbs Act violation – the federal jurisdictional fact – may be satisfied even if the record demonstrates that the extortion had no actual effect on commerce. Congressional concern is justified by the harmful consequences of the class of transactions to which the individual extortion belongs, and jurisdiction in the particular case is *satisfied by showing a realistic probability that an extortionate transaction will have some effect on interstate commerce."* (Emphasis ours)

The rule laid down in the *Staszcuk* case is as Judge Pell defines it in his dissent. Judge Pell said:

> "In sum, this court is squarely holding in a case, really of first impression, that the Hobbs Act has eliminated the necessity of actual affect on interstate commerce so long as it reasonably appeared at the time of the extortion that there would be such affect. I cannot agree that Congress intended such an extension."

We share Judge Pell's feelings that this is a judical extension of the language of the Act beyond the intent and purpose of Congress in passing this criminal statute. We cannot conceive of the Congress enacting a criminal statute which would permit the conviction of one on the surmise that his conduct might show a "reasonable probability" that he has violated a law of the United States. We suggest that historically our Courts have held that in a criminal case every essential element of a crime, including its jurisdictional elements as here, must be proven beyond a reasonable doubt.

We are not unaware that the District Court did find that commerce was affected since the assets of the business were depleted by the payment of the bribe and to that extent their ability to do business was diminished. The Court made this finding although acknowledging that the payment of the bribe to the officer in lieu of going to Court and paying a $500 fine actually resulted in a benefit to the commerce of the business (See District Court's Opinion appended hereto as Appendix A).

Quite frankly, we do not understand the anomaly created by these findings, but will acknowledge that the District Court had ample direction contained in the cases of *United States* v. *Crowley,* 504 2d 992 (7th Cir., 1974) and *United States* v. *Braasch,* 505 F. 2d 139 (7th Cir., 1974) *cert. denied* 421 US 910, where the Seventh Circuit Court of Appeals held that the payment of money from the funds of the victim and the resulting depletion of the assets of

the company affects interstate commerce. We would point out however that the object of the payment in those cases was to permit the payors to continue to operate in interstate commerce. This was not the object of the payment in this case. Here the operator of the trucks would continue in commerce whether or not they paid the bribe or the larger fine.

Here the illegal transaction, the extortion or bribe, had only a remote and coincidental connection with interstate commerce. The Hobbs Act does not provide that whoever commits an extortion or robbery that has some connection with interstate commerce shall be punished, but plainly provides as follows:

> "Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce by robbery or extortion or attempts or conspires so to do or commits or threatens physical violence to any person or property in furtherance of any plan or purpose to do anything in violation of this section shall be fined not more than $10,000, or imprisoned not more than 20 years, or both."

To distill the sentence down to its essence, we may thus state the sentence in the following form:

> Whoever in any way . . . affects commerce by . . . extortion . . . shall be fined . . . .

The construction of the sentence clearly shows that when commerce is affected, extortion is punishable. The subject of the sentence is "whoever," the predicate is "affects", and the object is "commerce." The prepositional phrase "by extortion" modifies the predicate and could be placed in several other positions in the sentence: "Whoever by extortion . . .," "Whoever in any way by extor-

tion . . .," and "Whoever . . . affects by extortion . . ." Whatever its placement, the phrase still by meaning is attached to the predicate, "affects." "Affects" is defined as "having an influence on" or "bringing about a change in." (*The American Heritage Dictionary of the English Language*)

The construction of the sentence also clearly shows that whatever else may be true, commerce must be influenced or changed by the extortionate act. In other words, only if commerce were affected by the act of the office could it be grammatically construed that the section applied to the situation at hand. The question, seen strictly from the construction of the sentence, is whether the extortion affected the movement of any article in commerce. Any broader reading of the sentence would have the effect of making virtually any bribe, theft, burglary, or robbery a federal offense. The burglary of a grocery store, for example, could be construed as affecting commerce if the owner of the store, because of the burglary, were unable to acquire items from interstate sources because his finances were depleted by the burglary. Surely the composer of the sentence contained in the Hobbs Act and the Congress that passed the Act intended no such wide application.

Furthermore, the clarification phrases in the sentence make it obvious that the intention is to punish anyone, and only anyone, who "affects commerce *or the movement of any article or commodity in commerce*" and that unless such movement was affected by the extortion, that extortion would *not* fall under the intention of the section. The phrases "or movement of any article or commodity in commerce" explain rather than amplify the word "commerce", explaining that what is meant by commerce is "movement." If such movement was not affected by the

extortion, then the extortion in this case does not come under the intention of the Act.

From the grammatical point of view, then, the sentence is so constructed that the reader must understand (1) that commerce is affected by the extortion, (2) that the extortion is the cause of the effect, and (3) that the movement of whatever article was in commerce was affected by the extortion under consideration.

We would point out that the Hobbs Act places robbery and extortion upon the same basis and applying the holding in *Crowley, Ibid,* that anytime money is taken from one who has some connection with interstate commerce that commerce is affected, the crime of robbery would become a Federal offense. Since all commercial activities are held by the Courts to have some interstate commerce connections it would follow that every robbery of which there are hundreds committed within each District each year, would become a Federal Crime. Certainly, the Congress did not contemplate such a significant result. The result would be an intrusion into the affairs of the several states by the National Government and such a holding would impose an almost insurmountable burden upon the Federal Judiciary.

While it seems to be the trend today for Federal Prosecutors to devote a great portion of their resources to dealing with the failures of local officials to adequately perform their duties we do not think that the Congress in enacting the Hobbs Act intended to treat the crime of extortion in a manner different than it intended to treat the crime of robbery. We think that in either case the concern of Congress in enacting the Hobbs Act was with interference of commerce, and with those acts the object of which are to obstruct, delay or affect it. We think that the prosecution of a police offiicer for fixing a ticket is a needless

injection of the Federal Government into a matter of State concern.

(b) There was no act of extortion on the part of the Petitioner as there was no coercion or duress, either expressed or implied, from the color of his office.

While the District Court's opinion recognizes our contention that the Petitioner did not commit extortion so as to establish the second jurisdictional element, the Opinion states that Petitioner's contention that his act was a bribe and not extortion is not relevant and cites *United States* v. *Hyde,* 448 F 2d 815 (5th Cir. 1971) cert. denied 404 US 1058 (1972) and *United States* v. *Braasch,* 505 F 2d 139 (7th Cir., 1974) cert. denied 421 US 910 (1975), for the proposition that under the Hobbs Act it does not matter that the conduct may constitute "classic bribery." We agree with this but this is not our contention.

We say that under the Hobbs Act it is irrelevant whether the conduct of the accused be classified as bribery or as extortion, but that the test is whether or not the payment was induced by coercion or duress. We agree with the interpretation of the Court of Appeals in *U.S.* v. *Kenny,* 462 F 2d 1205 (3rd Cir., 1972) cert. denied 409 US 914 (1972), that the term "under color of official right" is disjunctive as used in Section 1951 (b) (2) in defining extortion and that, therefore, the wrongful obtaining of property by a public official need not be induced by threats or actual force, violence or fear to bring the conduct within the terms of the Act. But, nevertheless, not every wrongful act of a public official affects a person adversely, nor is every wrongful act of a public official punished by Act of Congress.

If we read the Act as disjunctive it defines extortion as meaning "the obtaining of property from another induced under color of official right. The controlling word here is "induced." In order for conduct to constitute the public official must do something to induce or compel the victim to make payment. As pointed out in the case of *United States* v. *Sutton,* 160 F 2d 754 (7th Cir., 1947), it is the oppressive use of official power that is the essence of extortion. The Court there said that an official act must be committed which causes another to act by reason of the pressure from the office and not from his own violition.

Certainly, there was no evidence herein of an adverse effect upon the alleged victim, nor was there coercion, express or implied, from the fact that the officer was acting under color of office.

The Court pointed out in the first *Staszcuk* case 502 F 2d 882, (7th Cir., 1975), that every bribe of a public official is not an extortion. It is not relevant to a construction of the Hobbs Act as to whether the act is a bribe or whether it can be labeled extortion. The test is whether or not coercion is present, either overtly or through the color of the office. The Court said:

> "William J. Campbell, Senior District Judge (concurring).
>
> "I concur fully in Judge Sprecher's excellent opinion, and wish only to briefly state my own views with respect to Defendant's contention that his actions constituted no more than the acceptance of a bribe, and that his conduct was therefore not extortionate in character. The government need not demonstrate that a defendant, charged with extortion under color of official right, has obtained the property of another through the use of force, duress, fear or the threat of same. The evidence need only demonstrate that the public official has obtained from the 'victim' some-

thing of value to which the official is not entitled in return for something that should have been provided without payment. The office held by the official provides the coercive impetus which generates the payment.

"In the instant case, the alderman's duties included the objective and unbiased evaluation of applications for zoning variances. Staszcuk was paid money by virtue of his office as alderman so that the powers of that office would not be misused to the detriment of the payor, or at a minimum, to insure that the zoning application would receive the fair and unbiased consideration which it should have been afforded without the encouragement of additional compensation. Thus, the office provided the duress which rendered the acceptance of money by Staszcuk extortion under color of official right.

"That is not to *say, however, that as the government contends in the instant case, there is no distinction between the acceptance of a bribe by a public official and extortion under color of official right.* For example, assume that a public official has been paid a sum of money to induce him to use his position and influence to obtain a building permit on behalf of an applicant who is clearly not entitled under the law to such a permit. In such a case, the money which the public official receives is not being paid to prevent the coercive use of his office, but rather to assist the payor in his efforts to obtain something to which he is not lawfully entitled. As the court stated in United States v. Pranno, 385 F 2d 387, 390 (7th Cir., 1967) 'it migh' be solely a bribe and not extortion if the record showed that the issuance of the permit was illegal . . .'

"Finally, contrary to the defendant's contention in the instant case, bribery and extortion are not necessarily mutually exclusive offenses. Pranno, supra at 390. A single payment may be made for more than

one purpose, particularly where there exists some question regarding whether the payor is legally entitled to that for which he tenders payment. Where such is the case, the government need only to prove the extortionate element of the transaction to support a charge of extortion under color of official right."

Here the money received by the Defendant was not paid to him to prevent the coercive use of his office, the people who paid it were not victims, but the money was paid and received to assist the payors in their efforts to obtain something to which they were not entitled, i.e., the privilege of not appearing in Court in response to a lawful citation.

As pointed out in the case of *U.S.* v. *Pranno,* 385 F 2d 387 (7th Cir., 1967), "it might be solely a bribe and not extortion if the record showed that the issuance of the permit was illegal . . .". Here the only coercion employed was legal, i.e., the issuance of a lawful and valid citation. The payors were not wrongfully or illegally coerced into the payment, but merely elected to pay a bribe rather than pay a proper fine. See also *U.S.* v. *Critchley,* 353 F 2d 358 (3rd Cir., 1955), where the Court pointed out that the act of the defendant there in securing a bribe to withdraw a valid complaint against the payor in that he had failed to comply with contract specifications was not coercive and that such conduct did not affect commerce. We do not think there can be an extortion under color of office or otherwise unless there is a victim of the evil conduct.

VII. CONCLUSION

Wherefore, Odie Duke Grigson, Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals in the above entitled cause.

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

CRIMINAL No. 76-16

UNITED STATES OF AMERICA
Plaintiff,

vs.

ODIE DUKE GRIGSON
Defendant.

MEMORANDUM OPINION

Filed June 30, 1976

After a trial before the Court, the defendant, Odie Duke Grigson, was found guilty on two counts of violating the Hobbs Act (18 U.S.C. § 1951). At the conclusion of the Government's case, the defendant declined to introduce any testimony and moved the Court for a judgment of acquittal which was overruled for the reasons stated herein.

The facts in this case are that at all times involved the defendant was an enforcement officer for the Kenutcky Department of Motor Transportation. One of his duties was to enforce the regulations pertaining to the operation of trucks, including certain weight limitations on the Kentucky highways. On October 15, 1975, Phillip Rickie Shinkle was driving a truck for Hughes Construction Com-

pany, hauling sand and gravel to Erlanger, Kentucky, from another location also in Kentucky. Although the route taken by the truck driven by Shinkle was intrastate, the defendant had stipulated that the Hughes Construction Company was engaged in interstate commerce at the time its truck was stopped. Nevertheless, proof at the trial showed that Ben F. Hughes, doing business as Hughes Construction Co., Florence, Kentucky, was building homes in Kentucky and also in Hamilton, Ohio, and that he bought supplies for this business both in Kentucky and Ohio.

While Shinkle was hauling the sand and gravel to Erlanger, he was stopped by the defendant, who cited Shinkle for driving an overloaded truck, specifically being overweight by 14,440 pounds. Shinkle admitted that he knew he was overweight and though that a fine for such a violation would have been about $300-$400.

The defendant told Shinkle that he felt that he could help Shinkle by "working it out" with Shinkle's father-in-law, Hughes.

That same day, pursuant to the suggestion made by the defendant, Hughes met with the defendant at a restaurant in Florence and Hughes paid $50 to the defendant, who was supposed to "take care of it." Thereafter, neither Shinkle nor Hughes ever appeared in court or appeared any fine in connection with the offense. Hughes paid the defendant with money from the Hughes Construction Company bzusiness and would have paid the fine from the proceeds of his business, as had been done once before when Shinkle had been cited for driving an overweight truck.

The second count is similar in that on February 20, 1976, Curtis Mays of Fairfield, Ohio, driving for the Tri-State Drywall Supply Company of Fairfield, was cited for

driving an overweight truck in Campbell County, Kentucky, by the defendant. At the time the defendant stopped Mays, the defendant said that the truck was 11,200 pounds overweight on its rear axles and that the fine could be $500-$600. The defendant cited Mays for being overweight and told Mays to have his boss contact the defendant, giving him his home telephone number. Mays subsequently passed this information to his boss, Don Dwire, who called the defendant at the number given. The defendant advised Dwire over the telephone that he would "like to help him." Dwire informed the F.B.I., which sent an agent to pose as Dwire, since Dwire and Grigson had never met, at the time and place appointed, Southgate, Kentucky, on February 25, 1976. The defendant stipulated that the Tri-State Drywall Supply Company was engaged in interstate commerce at all times pertinent to this indictment.

When the F.B.I. Agent, Harold Harrison, went to meet Grigson, Grigson indicated that he would accept $100 to take care of the citation, but insisted that he receive the citation back. The $100 paid to Grigson at this time was property of the Federal Bureau of Investigation, but had Dwire met with Grigson, the money used would have come from the Tri-State Drywall Supply Company.

The defendant his filed a most persuasive memorandum of law in support of his contention that although he does not deny the facts involved, he asserts that it does not constitute a violation of the Hobbs Act in that: (1) it had no effect on interstate commerce; and (2) there was no extortion, although it might have been a bribe. The Court will take these questions up one at a time.

The defendant, relying primarily upon *United States* v. *Staszcuk,* 517 F. 2d 53 (7th Cir. 1975) (en banc),

affirming 502 F. 2d 882 (7th Cir. 1974), asserts that instead of hindering, delaying, or obstructing commerce, or having any kind of effect on commerce, the payment of the bribe to the officer in lieu of going to court and paying a much larger amount, resulted in a benefit to the commerce of the businesses. However, the Court finds here that commerce was affected in both instances. In the first instance, the defendant was paid directly from proceeds of an interstate business, and in the second situation, the defendant would have been paid from the proceeds of an interstate business. In the *en banc* decision in *Staszcuk,* in which the opinion was written by Judge John Paul Stevens (now on the Supreme Court), the conviction on one count was sustained based upon the testimony at trial that had the plans been carried through for construction of a hospital, it would have involved out-of-state materials. Admittedly, in the case at hand it may have had less of an effect on interstate commerce than the payment of a fine, but that does not mean that it does not have any effect at all. The extortionate conduct need only have a *de minimus* effect on commerce. *United States* v. *Braasch,* 505 F.2d 139 (7th Cir. 1974). Here, the effect on interstate commerce is count one is through the depletion of the assets of the business, similar to that in *United States* v. *Crowley,* 504 F.2d 992 (7th Cir. 1974); and in count two, similar to the potential impact upon interstate commerce as in *Staszcuk*.

Secondly, the defendant argues that he did not commit extortion because there was no coercion or duress. In support of that proposition, the defendant cites the concurring opinion of Judge William J. Campbell in the first *Staszcuk* case, 502 F.2d 882, and *United States* v. *Critchley,* 353 F.2d 358 (3d Cir. 1955). He argues that it is a bribe, not extortion, where a public official has

been paid money to do something that the payor is not entitled to. However, that is not the general interpretation of the Hobbs Act. Thus, it was stated in *United States* v. *Hyde,* 448 F.2d 815, 832 (5th Cir. 1971), *cert. denied,* 404 U.S. 1058 (1972):

> Threatening to take official action — even where it is action that the official is duty-bound to take — for the purpose of coercing the victim to pay the official is extortion.

The Court went on to say, at 833:

> It is the wrongful use of an otherwise valid power that converts dutiful action into extortion. If the purpose and effect are to intimidate others, forcing them to pay, the action constitutes extortion. Put another way, it is the right to impartial determination of the issue on the merits (i.e. whether to enforce the law or whether to picket or strike) that the victim is deprived of when these actions are taken for the purpose of coercing him into paying. The distinction from bribery is therefore the initiative and purpose on the part of the official and the fear and lack of voluntariness on the part of the victim.

This is the same interpretation given to extortion "under color of official right" under the Hobbs Act in *United States* v. *Braasch, supra* at 151:

> It matters not whether the public official induces payments to perform his duties or not to perform his duties, or even, as here, to perform or not to perform acts unrelated to his duties which can only as the motivation for the payment focuses on the as the motivation for the payment forcuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. § 1951. That such conduct may also constitute "classic bribery" is not a relevant consideration.

See also *United States* v. *Crowley, supra; United States* v. *Kenny,* 462 F.2d 1205 (3d Cir. 1972).

The Court, therefore, finds that extortion was performed by the defendant on the dates in the indictment as stated. The motion for judgment of acquittal is overruled.

This 30 day of June, 1976.

/s/ EUGENE E. SILER, JR.,
JUDGE

APPENDIX B

No. 76-1947

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

ODIE DUKE GRIGSON,
Defendant-Appellant.

ORDER

Filed December 13, 1976

Before: WEICK, PECK and LIVELY, Circuit Judges.

Upon consideration of the briefs, the record and oral argument of counsel, we are of the opinion that there was substantial evidence to support the judgment of conviction entered by the District Judge, who tried the case without a jury, and that no prejudicial error occurred at the trial.

The judgment of conviction is therefore AFFIRMED.

ENTERED BY ORDER OF THE COURT.

/s/ JOHN P. HEHMAN, Clerk

APPENDIX C

No. 76-1947

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

ODIE DUKE GRIGSON,
Defendant-Appellant.

ORDER

Filed January 20, 1977

Before: WEICK, PECK and LIVELY, Circuit Judges.

No active Judge having requested that a vote be taken on the suggestion that the petition for rehearing be heard en banc, said petition for rehearing was considered by the panel and found not to be well taken.

It is therefore ORDERED that the petition for rehearing be and it is hereby denied.

ENTERED BY ORDER OF THE COURT.

/s/ JOHN P. HEHMAN, Clerk

APPENDIX D

UNITED STATES CODE

§ 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or consipres so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through

any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.
June 25, 1948, c. 645, 62 Stat. 793.

No. 76-1141

In the Supreme Court of the United States

OCTOBER TERM, 1976

ODIE DUKE GRIGSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,

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Assistant Attorney General,

SIDNEY M. GLAZER,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals rendered no opinion. The opinion of the district court (Pet. App. 1a-6a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 13, 1976. A petition for rehearing was denied on January 20, 1977. The petition for a writ of certiorari was filed on February 17, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a state officer who obtains money from a truck owner operating in interstate commerce in return for failing to enforce a state weight limitation obstructs or affects commerce by extortion in violation of 18 U.S.C. 1951, the Hobbs Act.

STATUTE INVOLVED

18 U.S.C. 1951 provides in pertinent part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section-
>
> * * * * *
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
>
> (3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

STATEMENT

Following a jury-waived trial before the United States District Court for the Eastern District of Kentucky, petitioner was convicted of two counts of extortion in violation of 18 U.S.C. 1951, the Hobbs Act. He was sentenced to concurrent terms of two years' imprisonment. The court of appeals affirmed (Pet. App. 7a).

The facts are set forth in the opinion of the district court (Pet. App. 1a-3a). Briefly, the evidence showed that petitioner, a Kentucky law enforcement officer, stopped a truck belonging to the Hughes Construction Company on October 15, 1975, and cited the driver, Philip Shinkle, for operating an overweight vehicle. After the driver admitted that he knew the truck was overweight, petitioner offered to "work something out" with Ben Hughes, the owner of the truck (Tr. 9). The same day, petitioner met with the Hughes, who paid petitioner $50 from the assets of the business to "take care" of the ticket (Tr. 10, 19, 22). Thereafter, the driver and the owner did not appear in court and did not pay any fine in connection with the offense. It is uncontested that Hughes Construction Company was engaged in interstate commerce at the time of the incident (Tr. 20).

On February 20, 1976, petitioner cited Curtis Mays, a truck driver for the Tri-State Drywall Supply Company, another firm engaged in interstate commerce, for operating an overweight truck. Petitioner told Mays that the fine could be $500 to $600 and suggested that Mays' boss contact petitioner so that they might work something out (Tr. 23-27, 32). Donald Dwire, Mays' boss, telephoned petitioner that afternoon, arranged a meeting with him, and then contacted the Federal Bureau of Investigation (Tr. 33-34). Several days later, an FBI agent posing as Mr. Dwire met with petitioner. Petitioner said that he would accept $100 to take care of the citation, and the agent paid him $100 in funds belonging to the FBI (Tr. 39-44; Gov't. Ex. 5).

ARGUMENT

1. Petitioner contends (Pet. 15-19) that his conduct in demanding and obtaining payments for voiding citations issued in his official capacity did not constitute extortion

within the meaning of the Hobbs Act, 18 U.S.C. 1951. That statute defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear, or under color of official right." Petitioner argues that the "color of official right" portion of the statute cannot be violated in the absence of coercion by threat, fear or duress.

This contention, which is inconsistent with the disjunctive formulation of the statute, has been uniformly rejected by the courts of appeals to which it has been presented, and this Court has consistently refused to review the issue. See *United States* v. *Hathaway,* 534 F. 2d 386 (C.A. 1), certiorari denied, No. 75-1529, October 4, 1976; *United States* v. *Trotta,* 525 F. 2d 1096 (C.A. 2), certiorari denied 425 U.S. 971; *United States* v. *Mazzei,* 521 F. 2d 639 (C.A. 3), certiorari denied, 423 U.S. 1014; *United States* v. *Braasch*, 505 F. 2d 139, 151 n. 8 (C.A. 7) certiorari denied, 421 U.S. 910; *United States* v. *Crowley,* 504 F. 2d 992 (C.A. 7); *United States* v. *Hyde,* 448 F. 2d 815 (C.A. 5), certiorari denied, 404 U.S. 1058; *United States* v. *Kenny,* 426 F. 2d 1205 (C.A. 3), certiorari denied, 409 U.S. 914.

Petitioner appears to argue (Pet. 18-19), that these events constituted bribery and not extortion, relying upon two of the opinions in *United States* v. *Staszcuk,* 502 F. 2d 875, 882 (C.A. 7) (Campbell, J., concurring), on rehearing *en banc,* 517 F. 2d 53, certiorari denied, 423 U.S. 837. Nothing in those opinions suggests, however, that payment solicited by an official to abstain from threatened enforcement of the law does not constitute extortion within the meaning of the Act, and in fact the law is clear that bribery and extortion are not mutually exclusive offenses. See, *e.g., United States* v. *Hathaway, supra,* 534 F. 2d at 394. In *United States* v. *Braasch, supra,* like Staszcuk a

Seventh Circuit case, the court of appeals rejected the argument that officials who take money for failing to perform their duties would not be guilty of extortion. The court stated (505 F. 2d at 151):

> It matters not whether the public official induces payments to perform his duties or not to perform his duties, or even, as here, to perform or not to perform acts unrelated to his duties which can only be undertaken because of his official position. So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. §1951. That such conduct may also constitute "classic bribery" is not a relevant consideration.

This has been the consistent view of the courts of appeals. "Threatening to take official action - even where it is action that the official is duty-bound to take - for the purpose of coercing the victim to pay the official is extortion." *United States* v. *Hyde, supra,* 448 F. 2d at 832; see also *United States* v. *Gill*, 490 F. 2d 233 (C.A. 7), certiorari denied, 417 U.S. 968; *United States* v. *DeMet*, 486 F. 2d 816 (C.A. 7), certiorari denied, 416 U.S. 969. Petitioner's explicit threat to enforce the citation for the weight violation unless money was paid to him constituted extortion within the meaning of the statute.

2. Although petitioner's extortionate demands were directed at two companies engaged in interstate commerce, he also contends (Pet. 9-16) that his conduct did not sufficiently "affect commerce" to support application of the Hobbs Act. The courts below correctly rejected this argument.

In enacting the Hobbs Act, Congress intended to utilize its constitutional power to regulate commerce to the fullest possible extent. *Stirone* v. *United States*, 361 U.S. 212,

215. The purpose of the Act parallels the central design of the Commerce Clause itself and therefore proscribes extortion that "in any way or degree obstructs, delays or affects commerce" *United States* v. *Staszcuk, supra,* 517 F. 2d at 58. The statute thus grants federal jurisdiction in all situations where commerce is affected, even where the affect may be minimal. *United States* v. *Tropiano,* 418 F. 2d 1069 (C.A. 2), certiorari denied, *sub nom. Grasso* v. *United States,* 397 U.S. 1021; *Carbo* v. *United States,* 314 F. 2d 718, 732 (C.A. 9), certiorari denied, 377 U.S. 953; *United States* v. *Gill, supra; United States* v. *Amato,* 495 F. 2d 545 (C.A. 5).

Whatever the outer jurisdictional limits of the Hobbs Act, extortion directed at the owners and drivers of trucks engaged in commerce has always been considered to be within the reach of the Act. Cf. *United States* v. *Enmons,* 410 U.S. 396, 401; *United States* v. *Local 807,* 315 U.S. 521. Here, the fact that petitioner' scheme imposed on trucking companies engaged in interstate commerce the burden of paying funds to petitioner is sufficient to meet the jurisdictional prerequisite. The statute does not require the court to make the comparison urged by petitioner (Pet. 9) between the amount of money extorted and the fine that might have been levied had the citation been enforced. It is speculative whether petitioner would have stopped the trucks at all absent the opportunity they presented for extortion. That the ability to issue lawful citations was utilized in a fashion that placed a burden on those engaged in interstate commerce is sufficient to sustain the Hobbs Act violation.[1] Cf. *Perez* v. *United States,* 402 U.S. 146, 151-154.

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[1]The violation here affected commerce in an additional fashion by interfering with the enforcement of laws regulating the weight of trucks. These state weight maximums are designed to protect the structural soundness of arteries of commerce, and there is a "realistic probability" that an interference with the enforcement of such laws would also have had some effect on interstate commerce by damaging the highways.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Attorneys.

MAY 1977.

*The Solicitor General is disqualified in this case.

DOJ-1977-05